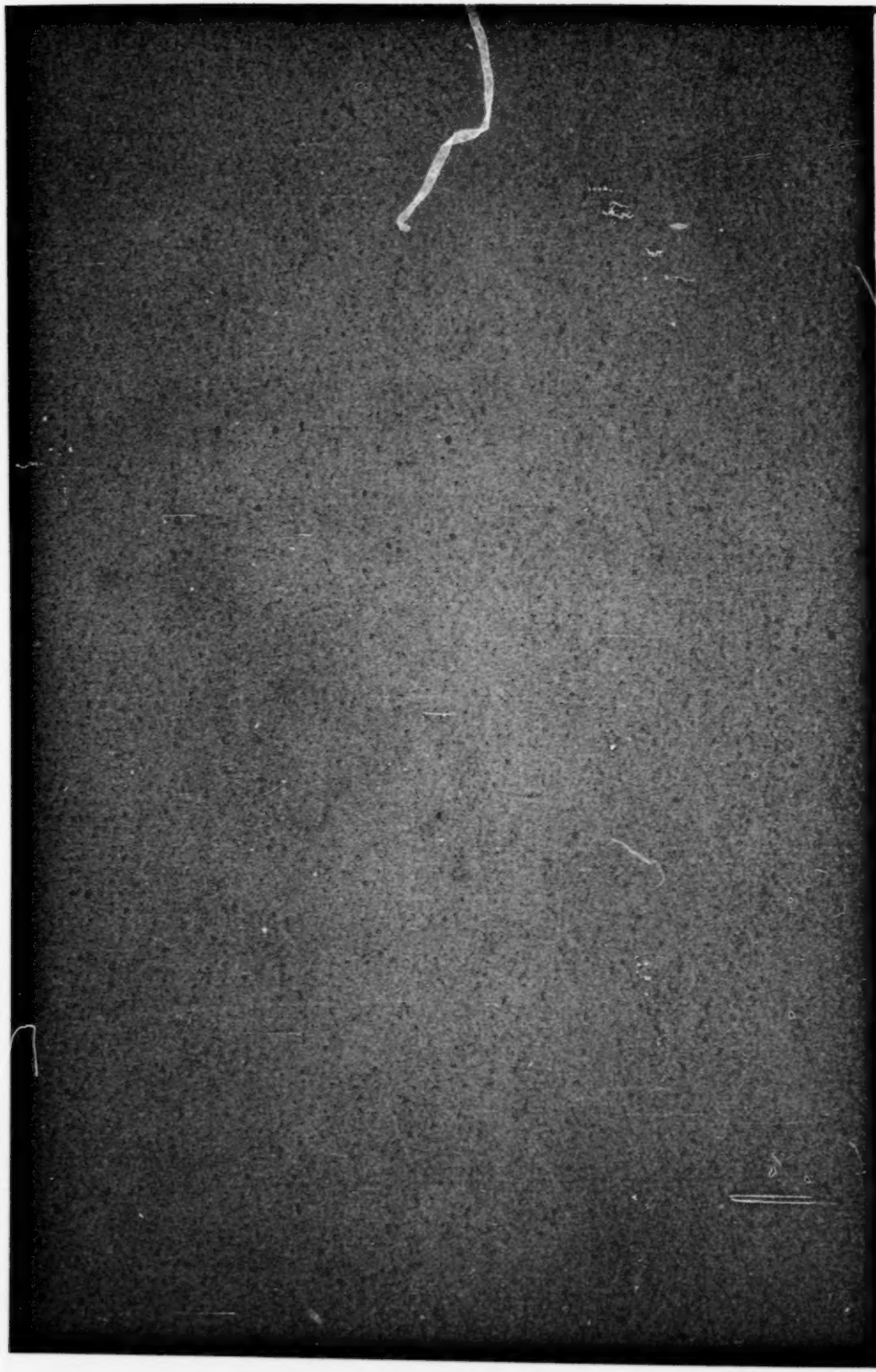

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1840

MERCK AND CO., INC.,

Petitioner,

v.

PAUL J. McGARVEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Respondent, Paul J. McGarvey, opposes the Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 12, 1974.

OPINIONS BELOW.

The opinion of the court of appeals is reported as a decision without a published opinion at 493 F. 2d 1401. The court's opinion appears in the Petitioner's Appendix at p. A1, and Judge Garth's concurring opinion appears in the Appendix at p. A3. The opinion of the district court is reported at 359 F. Supp. 525, and it appears in the Appendix at p. A16. The opinion of the court of appeals in *Goger v. H. K. Porter Co., Inc.*, which construes the same statute and involves legal issues essentially identical to those presented by the instant case, is reported at 492 F. 2d 13, and appears in the Appendix at p. A5. The district court's opinion in *Goger* is reported unofficially at 5 Fair Employment Practice Cases 695.

JURISDICTION.

The judgment of the court of appeals was entered on March 23, 1974. Petitioner's request for a rehearing was denied by an order entered on April 4, 1974. The Petitioner invokes the jurisdiction of this court pursuant to 28 U. S. C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED.

1. Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq. (See Petitioner's Appendix, p. A21).

2. Rule 19, Supreme Court Rules, U. S. Sup. Ct. Rule 19, 28 U. S. C.

3. 28 U. S. C. § 1254(1).

STATEMENT OF THE CASE.

Basis for Federal Jurisdiction in the District Court.

Plaintiff-Respondent, McGarvey, invoked the district court's jurisdiction under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq., particularly § 626(c). (See Petitioner's Appendix, pp. A21, A27.)

Nature of the Case and the Proceedings Below.

The Plaintiff-Respondent Paul J. McGarvey, hereinafter "McGarvey," was formerly employed with Merck and Co., Inc., hereinafter "Merck," at its Research Laboratory Division, located in West Point, Pennsylvania, for over eighteen years. On November 13, 1970, McGarvey was fired from his job as manager of the laboratory and office services at Merck's West Point plant because he was fifty-nine years old.

After reading of the Age Discrimination Act, Mr. McGarvey telephoned the Philadelphia office of the Pennsylvania Human Relations Commission, hereinafter "PHRC," in February, 1971 and explained his case. He was advised to take his complaint to the U. S. Department of Labor. Mr. Leonard Myers, an attorney and a friend of McGarvey, consulted with the U. S. Department of Labor's Regional Attorney, and was advised that McGarvey should bring any complaint that he had concerning Merck's termination of him because of his age to the Philadelphia office of the Wage and Hour Division of the U. S. Department of Labor.

McGarvey took his complaint against Merck to Mr. Thomas Johnson, an investigator for the Wage and Hour Division, on March 3, 1971. Mr. Johnson assured McGarvey that the Wage and Hour Division was the proper place for his complaint. On March 31, 1971, McGarvey signed an

authorization permitting the U. S. Department of Labor to investigate his complaint, and on April 23, 1971, the Department initiated an investigation. Based upon the information and advice of both the PHRC and the U. S. Department of Labor, McGarvey did not file a complaint with the PHRC.

On April 20, 1971, McGarvey notified the Secretary of Labor of his intent to sue Merck, pursuant to Section 7(d) of the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 626(d) (the statute is reproduced in Petitioner's Appendix, p. A27). McGarvey filed his complaint in the United States District Court for the District of New Jersey on March 2, 1972, pursuant to Section 7(c) of the Act, 29 U. S. C. § 626(c). Merck answered, denying McGarvey's allegations and contending as a defense that the complaint was barred by McGarvey's failure to file a complaint with the PHRC, as allegedly required by Section 14(b) of the Act, 29 U. S. C. § 633(b). McGarvey moved to strike this defense, and Merck filed a cross-motion for a judgment on the pleadings. These motions were considered by the court without a hearing or oral argument.

District Court Judge Clarkson S. Fisher held, in an opinion and order dated April 10, 1973, and filed April 11, 1973, that ". . . where substantial relief against alleged age discrimination is available under state law, 29 U. S. C. Sec. 633(b) requires the person aggrieved to pursue state remedies prior to filing a complaint with this court." (See Petitioner's Appendix, p. A20(a), 350 F. Supp. at 528). Judge Fisher ruled that due to McGarvey's failure to allege a resort to "the appropriate state remedy," the district court lacked jurisdiction over the subject matter of Mr. McGarvey's suit, and therefore ordered that Mr. McGarvey's complaint be dismissed.

On April 9, 1973, counsel for McGarvey mailed an affidavit to the district court attesting to McGarvey's consultation with the PHRC and the Wage and Hour Division of

the United States Department of Labor. The affidavit was not filed until April 11, 1973 and apparently was not considered by the district court. At no time prior to the filing of McGarvey's Notice of Appeal did Merck request a hearing in the district court to challenge the assertions contained in the affidavit.

On May 10, 1973, McGarvey appealed the district court's dismissal of the complaint, challenging the district court's construction of 29 U.S.C. § 633(b). Alternatively, Mr. McGarvey argued that if the court of appeals upheld the district court's interpretation of the statute, that he be allowed to maintain his complaint on equitable grounds.

The United States Department of Labor obtained permission from the court to file an *amicus curiae* brief in support of McGarvey's argument that § 633(b) does not require prior resort to state agencies as a prerequisite to the district court's jurisdiction.

In a *per curiam* decision, the majority of the three judge panel upheld the district court's conclusion that § 633(b) required an aggrieved individual to resort initially to the appropriate state agencies charged with remedying age discrimination as a jurisdictional prerequisite to seeking relief in the federal courts. The majority held, however, that McGarvey's unsuccessful attempts to obtain relief from the PHRC constituted "special circumstances" warranting the court ". . . to vacate the district court's decision for equitable reasons, . . ." (See Petitioner's Appendix, p. A2). The majority ordered that the district court stay the suit in order to allow McGarvey to present his claim to the PHRC, ". . . and if necessary thereafter, conduct further proceedings not inconsistent with this opinion." (See Petitioner's Appendix, p. A3). Circuit Judge Leonard Garth concurred with the result reached by the majority, but disagreed with the majority's interpretation of § 633(b). (See Petitioner's Appendix, pp. A3, 4).

Merck's Petition for Rehearing and Suggestion for Rehearing in Banc was denied by the court of appeals. Merck's motion for stay of mandate was granted by the court, and later extended through June 10, 1974.

SUMMARY OF ARGUMENT.

The Rules of the Supreme Court provide that review of a case by the Supreme Court pursuant to a petition for certiorari is a matter of the court's discretion, and such a petition for certiorari will be granted only afer a showing that special and important reasons warrant review by the court. Merck's petition presents no question of constitutional or statutory interpretation, nor any issue of public policy justifying this Court's attention. Therefore, the petition should be denied.

Merck's claim that the court of appeals' decision violates the usual and accepted course of judicial proceedings is without factual basis. The court of appeals' just and equitable action permits a resolution of the merits of the complaint, and avoids penalizing McGarvey for relying in good faith on the erroneous advice of the U. S. Department of Labor and the Pennsylvania Human Relations Commission. Further, the court of appeals' decision comports with decisions of this court and those of other courts of appeals construing Title VII of the Civil Rights Act of 1964, to which the Age Discrimination in Employment Act of 1967 has been analogized.

Finally, if *any* issue warranting review by this Court is presented by the instant case, the *only* issue that should be examined is the proper construction of Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 633(b).

ARGUMENT.

I.

Merck's Petition for a Writ of Certiorari Raises No Special and Important Questions of Law for the Court to Decide, and Should Therefore Be Denied.

Merck's Petition for a Writ of Certiorari makes the argument that the court of appeals has failed to properly apply § 14(b) of the Age Discrimination in Employment Act,[1] hereinafter "the Act," to the instant facts. Merck notes that the court of appeals agreed with the district court's conclusion that § 633(b) of the Act establishes the prior resort to appropriate State remedies as a prerequisite to the existence of subject matter jurisdiction in the district court. Merck argues that, since the facts show that McGarvey never filed a complaint with the PHRC, the district court was deprived of subject matter jurisdiction, regardless of the reasons for McGarvey's failure to file a com-

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1. § 633. Federal-State relationship—Federal action superseding State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

plaint with the PHRC. Merck concludes that the court of appeals had no choice but to affirm the district court, and argues that the court of appeals' failure to do so amounts to a misapplication of § 633(b).

Merck attributes the court of appeals' misapplication of § 633(b) to the court's erroneous reliance upon McGarvey's affidavit.[2] The court of appeals cited that part of the affidavit in which McGarvey described his attempts to resort to the PHRC in February, 1971, and the advice he received from the PHRC directing him to take his complaint to the Department of Labor, as grounds for vacating the district court's dismissal ". . . for equitable reasons, . . ." (Petitioner's Appendix, p. A2). Merck objects to the court's reliance on the affidavit because (a) it was not presented to the district court, and therefore was not properly before the court of appeals, and (b) Merck had no opportunity to contest the alleged facts in the affidavit.[3]

28 U. S. C. § 1254(1), under which Merck invokes this Court's jurisdiction, provides that decisions of the courts of appeals may be reviewed by this Court "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ." As this Court noted with respect to an earlier form of the present statute authorizing review by a writ of certiorari, "the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a comprehensive and unlimited power." *Forsyth v. City of Hammond*, 166 U. S. 506, 513 (1897). The Court's power of review through a writ of certiorari is

2. Merck characterized this affidavit as ". . . a last ditch attempt to cure or 'excuse' fatal jurisdictional defects, . . ." Petition, p. 10. For a discussion of the affidavit, see Part II of the Argument, *infra*.

3. See Part II of Argument, *infra*.

employed with a degree of caution and care commensurate with the virtually unlimited breadth of that power. As Rule 19(1) of the Rules of this Court states, "[a] review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." U. S. Sup. Ct. Rule 19(1), 28 U. S. C. As the Court noted in discussing the proper exercise of this power of review,

> [t]he jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Import Company v. Coty*, 262 U. S. 159, 163 (1923).

Among the court of appeals' decisions outlined in Rule 19 of the Supreme Court Rules which might warrant a grant of a petition for a writ of certiorari by this court are those courts of appeals' decision which (1) conflict with decisions from other circuits; (2) decide an important state or territorial question in a way which conflicts with applicable state or territorial law; (3) decide an "important" question of federal law which has not been previously settled by the Supreme Court; (4) decide a federal question in a way which conflicts with applicable Supreme Court decisions; (5) depart so far from the usual course of judicial proceedings that the Supreme Court must exercise its supervisory powers over the offending courts of appeals.

The case at bar might appear to present a court of appeals decision deciding a federal question which the

Supreme Court has not previously settled, i.e., the correct interpretation and application of § 633(b).[4] Merck does *not*, however, challenge the construction applied to § 633(b) by either the district court or the majority of the court of appeals. Indeed, Merck takes the court of appeals' construction of the statute as the *foundation* for its petition, not as its *subject*. No question of the proper construction of any part of the Act, or for that matter, any other statute is presented by Merck's petition for the simple reason that Merck's interpretation of § 633(b) was accepted completely by the court of appeals.

Respondent McGarvey submits that Merck's petition for a writ of certiorari does not present ". . . questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty, supra.* Merck's petition describes no issues of national policy, of statutory construction, or of constitutional interpretation for this Court to hear and decide, and therefore it should not be granted by the Court.

II.

The Court of Appeals Has Not Acted Improperly or Contrary to the Decisions of This Court and Therefore, Certiorari Should Not Be Granted.

Petitioner Merck attempts in its Petition to place this case under the ambit of Rule 19(1)(b) by arguing that the court of appeals' decision in this case (and incidentally its decision in *Goger v. H. K. Porter Co., Inc., supra,* as

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4. At this time, the only decision that Respondent has found construing § 633(b), other than the decision of instant courts below, is *Goger v. H. K. Porter Co., Inc.,* 492 F. 2d 13 (3rd Cir. 1974), vacating and remanding *Goger v. H. K. Porter Co., Inc.,* — F. Supp. —, 5 FEP Cases 695 (D. N. J. 1973). No other Circuit, nor this court, has spoken on the interpretation of § 633(b).

well[5]) departs so far from the usual course of judicial proceedings that it flies in the face of applicable decisions of this Court, and therefore, warrants review. Merck apparently suggests that the "special and important reasons" justifying review by this Court pursuant to a writ of certiorari are readily apparent in the court of appeals' egregiously erroneous conduct in this case.

Essentially, the court of appeals did two things to which Merck objects: (a) it remanded to the district court with instructions to stay the cause in order to permit McGarvey ". . . to present facts and legal contentions before the Pennsylvania Human Relations Commission regarding the possibility of a waiver or estoppel with respect to the statute of limitations.";[6] (b) it indicated that, should McGarvey be barred from presenting his complaint to the PHRC, the district court ". . . should nonetheless entertain appellant's complaint since this case comes before us in a posture virtually identical to that of *Goger, supra.*"[7] Merck suggests that the court of appeals was mistakenly swayed by McGarvey's affidavit. Merck argues vigorously that this affidavit should not have been considered by the court of appeals because (1) it was not properly before, and was not considered by the district court, and (2) Merck had no opportunity to challenge the facts alleged in the affidavit. Merck is unimpressed by the court of appeals' statement that its decision was justified by ". . . equitable reasons, just as [was its decision] in *Goger.*"[8]

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5. See Petition, p. 11, n. 16.

6. See Petitioner's Appendix, p. A3; *see also* 43 P. S. § 959 (1964).

7. See Petitioner's Appendix, p. A3. The specific features of the court of appeals' remedy are discussed in pp. 20-22, *infra.*

8. See Petitioner's Appendix, p. A2.

A. McGarvey Has Acted in Good Faith at All Times Relevant to This Complaint.

The entire thrust and tone of Merck's argument before the court of appeals, and in support of this petition, is that McGarvey intentionally evaded his state remedy, and that he attempted to cover this evasion with the affidavit filed in the district court. Merck seems to suggest that McGarvey filed the affidavit at a time when he knew the district court would not consider it, and at a time when he knew that Merck would not have an opportunity to challenge the facts contained in the affidavit.

As McGarvey explained to the court of appeals, he did not allege a prior resort to his state remedies in his complaint because everything that he knew prior to the district court's decision indicated that he had *no* state remedy. The PHRC told him that he should take his complaint to the U. S. Department of Labor, and when he subsequently went to that federal department, he was advised that he, indeed, had brought his complaint to the proper agency. As a result of this advice, he never filed a complaint with the PHRC, for the simple reason that both the PHRC and the federal agency told him he should not do so.

Similarly, McGarvey did not allege in his complaint that he "resorted" to the PHRC because all the state and federal agencies he contacted told him that the PHRC had no authority over, or business with his complaint. Thus, far from attempting to "by-pass" the PHRC, as Merck and the district court suggest, McGarvey was directed elsewhere by the PHRC. Rather than deviously scheming to avoid a state remedy to which he would readily have resorted if he were making a good faith effort to pursue his complaint, as Merck contends, McGarvey was searching for *the proper forum* for his complaint. All the advice he re-

ceived directed him to the federal bureaucracy, and later, the federal courts, and, in good faith, that is where he went.

In a companion argument, Merck suggests that McGarvey manufactured the facts presented in his affidavit at the last minute in order to excuse his failure to file a complaint with the PHRC. Merck argues that the ersatz nature of the affidavit is demonstrated by McGarvey's intentional submission of the affidavit in time to be placed into the record, but too late to be considered by the district court, and too late to be challenged by Merck.[9]

Merck's argument concerning the affidavit amounts to a series of groundless accusations. The timing of the district court's decision was not known by McGarvey or by his counsel. McGarvey's motion to strike and Merck's motion for judgment on the pleadings were presented to the district court on briefs *alone*. The district court did not conduct an evidentiary hearing, and no oral argument on the motions was heard. The affidavit was sent to the district court in the full expectation that the court would consider it, and counsel for McGarvey was most chagrined that the court made its decision without benefit of the facts presented in the affidavit. That McGarvey's affidavit and the district court's decision crossed in the mails was unfortunate; it was *not*, contrary to Merck's accusations, the result of bad faith conduct by McGarvey.

As for Merck's suggestion that the facts attested to in the affidavit are not true, McGarvey can only respond that he has sworn under the oath that the facts contained therein are true, and he stands by them. Merck protests that it never had an opportunity to test the veracity of these facts, allegedly as a result of McGarvey's deviousness. As noted previously, these facts were presented in an affidavit because no hearing was held by the court. McGarvey simply

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9. See Petition, p. 10.

did not submit his affidavit in order to thwart any attempt by Merck to contest the facts presented therein.[10]

B. There Are Compelling Equitable Grounds for Vacating the District Court's Dismissal of the Complaint.

The court of appeals relied upon various "equitable reasons" and "special circumstances" in vacating the district court's dismissal of McGarvey's complaint. The court noted that the instant case came up on appeal ". . . in a posture virtually identical to that of *Goger, supra.*"[11] An examination of the court's rationale in *Goger* reveals the "equitable reasons" the court had in mind in the instant case.

In *Goger,* the plaintiff did not complain of the alleged age discrimination visited upon her to the Division of Civil Rights in the Department of Law and Public Safety, the New Jersey state agency authorized to enforce the New Jersey statute prohibiting age discrimination in employment. The defendant moved to dismiss the plaintiff's district court complaint on the same basis argued by Merck below: that § 633(b) requires a plaintiff to resort to the available state remedies for age discrimination in employment as a prerequisite for bringing a federal suit. The plaintiff contested this interpretation, as did McGarvey in the instant case, but argued alternatively that the district court should retain jurisdiction while allowing the plaintiff sufficient time to seek redress through the appropriate New Jersey state agency. The plaintiff relied upon the United States Supreme Court's decision in *Crosslin v. Mountain States Telephone Co.,* 400 U. S. 1004 (1971).

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10. It should be pointed out that Merck at no time after the district court decision ever requested a hearing before the district court in order to examine McGarvey concerning the facts presented in the affidavit.

11. See Petitioner's Appendix, p. A3.

The district court reviewed the facts in the *Crosslin* case and noted particularly that plaintiff Crosslin never commenced proceedings in the appropriate state agency prior to filing discrimination charges with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 because the EEOC advised her that the state agency in question did not have jurisdiction over her case. The district court distinguished the facts in *Goger* from those in *Crosslin:*

> [p]etitioner [in Crosslin] was confronted with a rather complex question . . . [and her] reliance on the opinion of the EEOC was justified, despite the fact that their view subsequently proved erroneous. [In addition] [p]etitioner, as a layman, did everything which may be reasonably expected of her to comply with the procedural intricacies of Title VII.
>
> Those factors are not present in the case before us . . . The opinion of the Secretary of Labor to the effect that the plaintiff was free to commence her action was so obviously contrary to the express and readily comprehensible language of the Act that plaintiff's reliance on that view must be deemed to be without justification. Further, and in line with the above, plaintiff was represented by counsel during the period in which it would have been proper to commence proceedings under state law.
>
> — F. Supp. at —, 5 FEP Cases at 698.

The district court found the *Crosslin* rationale inapplicable, and dismissed Goger's complaint.

On appeal, the U. S. Court of Appeals for the Third Circuit agreed with the district court that § 633(b) required

a potential plaintiff to resort to the appropriate state agency prior to the commencement of a suit in federal district court. Nevertheless, the court of appeals vacated the district court's dismissal of the complaint with the comment that ". . . we . . . consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing Section 633(b) during the period involved here and in view of the remedial purpose of the 1967 Act.", citing *Love v. Pullman,* 404 U. S. 522 (1972), *Sanchez v. Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970), *Choate v. Caterpillar Tractor Co.,* 402 F. 2d 357 (7th Cir. 1968), and *Crosslin v. Mountain States Telephone Co., supra.*[11]

As the court of appeals noted in its opinion, the instant case was in an almost identical "posture" as *Goger.* Here, as in *Goger,* there was absolutely no case law in existence at the time McGarvey was supposed to have gone to the PHRC construing § 633(b) as requiring a resort to available state remedies as a prerequisite to jurisdiction in federal court. (Indeed, prior to January, 1973, there were no cases construing § 633(b) at all.) Here, as in *Goger* and in *Crosslin, supra,* the plaintiff did not file a complaint with the appropriate state agency because the federal agency (here, the U. S. Department of Labor) assured him that he should not do so. McGarvey, like plaintiff Crosslin, was not represented by counsel during the period when, it is argued, he should have filed a complaint with the state agency. Thus, the same kinds of equitable considerations voiced by the Supreme Court in *Crosslin, supra,* and by the Third Circuit in *Goger, supra,* seem readily applicable to the facts in this case.

There is, however, a significant factual difference between this case, and either *Crosslin* or *Goger,* which the

11. See Petitioner's Appendix, pp. A10-11.

court of appeals noted in its opinion. Unlike plaintiffs Crosslin and Goger, Plaintiff-Respondent McGarvey initially went to the appropriate state agency, the PHRC, and that state agency told him that he should take his complaint to the U. S. Department of Labor because the state had no jurisdiction over his problem. McGarvey submits that this fact further justifies the court of appeals' action in this case.

Merck countered these equitable considerations in the court of appeals by arguing, essentially, that the plaintiff who relies on advice which subsequently is found to be contrary to a court's construction of a statute, does so at his own risk. This argument presupposes that there is no question as to the meaning of the statute. Respondent McGarvey submits that a legitimate question concerning the interpretation of § 633(b) over which reasonable men can and do differ was presented to the court of appeals. While the court of appeals adopted a construction of § 633(b) contrary to the interpretation urged by McGarvey and the U. S. Department of Labor, the court recognized that to suggest that an aggrieved person is not justified in relying on the advice of the federal agency charged with administering a federal statute would be harsh indeed, especially when the statute in question has been the subject of one case decision prior to this case, and no case decisions prior to 1973.[12]

The equitable basis for the court of appeals' action appears even more persuasive in light of the policy the Act seeks to accomplish. The Act, like Title VII of the Civil Rights Act of 1964 upon which Merck relied so heavily in the courts below, reflected a rising national concern over widespread discriminatory practices in American life. The

12. See the court of appeals comment in *Goger*, Petitioner's Appendix, p. A11.

courts have repeatedly recognized, with reference to Title VII, that the statute is to be construed liberally. *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Rogers v. Equal Employment Opportunity Commission*, 454 F. 2d 234 (5th Cir. 1971); *Tipler v. E. I. duPont de Nemours and Co.*, 443 F. 2d 125 (6th Cir. 1971); *Love v. Pullman Co.*, 404 U. S. 522 (1972). This general principle of liberal interpretation has been particularly emphasized when procedural questions arise under Title VII. *Love v. Pullman, supra; Crosslin v. Mountain States Telephone Co., supra; Sanchez v. Standard Brands Co., supra.*

The rationale of these Title VII cases is readily applicable to the instant case. The Act is a remedial statute with humanitarian objectives similar to those of Title VII, and it should be construed liberally, particularly with respect to procedural technicalities. The court of appeals apparently had this policy in mind in vacating the district court's order, and McGarvey submits that the court acted properly and equitably. As Judge Goldberg noted in *Sanchez v. Standard Brands, Inc., supra:*

> . . . Chief Judge Brown of this circuit has characterized the encounter between a Title VII complainant and "a huge industrial employer" as a "modern day David and Goliath confrontation." . . . In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy. (citations omitted) 431 F. 2d at 467

McGarvey submits that the court of appeals' decision has preserved an opportunity for the merits of the complaint

to be resolved, and has served the ends of equity and justice.

C. The Court of Appeals' Remedy Is Limited and Fair.

Merck complains that the specific remedy ordered by the court of appeals does such violence to the usual course of judicial proceedings that this court should exercise its powers of supervision over the lower court and correct its mistake. Merck particularly objects that the court of appeals' order means that "McGarvey *will* necessarily 'end up . . . in the very forum denied him' and very promptly, for the simple reason that under Pennsylvania law his right to file a complaint with the Pennsylvania Commission expired February 11, 1971."[13]

The court of appeals' order, initially, vacated the district court's dismissal and remanded the complaint to the district court with directions that it be stayed to allow McGarvey to ". . . present facts and legal contentions before the Pennsylvania Human Relations Commission regarding the possibility of a waiver or estoppel with respect to the statute of limitations."[14] Merck argues that this part of the order is pointless because the statute of limitations on the state remedy has lapsed, and McGarvey is foreclosed from obtaining relief before the PHRC.[15] This argument presumes a "fact" that simply has not been established. It is by no means a foregone conclusion on the instant facts that the PHRC's advice to McGarvey does not constitute a waiver of the statute of limitations, or alternatively, that this advice does not stop the PHRC from invoking the statute of limitations now. Indeed, because of this petition, McGarvey has been unable to proceed

13. See Petition, p. 9.
14. See Petitioner's Appendix, p. A3.
15. See Petition, p. 12, n. 20.

before the PHRC to investigate the issue.[16] Thus, McGarvey is not automatically returned to the federal forum that would otherwise be denied to him, as Merck argues. Rather, the court of appeals has provided the PHRC the chance to act in light of the court's construction of § 633(b).

The second part of the court of appeals order provides that *if* the PHRC bars McGarvey's complaint, the district court should entertain the complaint. In effect, the court of appeals has directed the district court to treat this *second* resort to the PHRC by McGarvey as sufficient to fulfill the jurisdictional requirement the court has derived from § 633(b).[17] Merck complains that this part of the order is inappropriate, and that at the most, the court of appeals should order a hearing on the facts contained in McGarvey's affidavit.

McGarvey submits that the court of appeals' order accomplishes the equitably and just result based upon the facts. As has been pointed out *infra*, McGarvey ended up in the federal forum through no fault of his own, but rather on the advice of every government authority he could reasonably expect to direct him to the proper forum for his complaint. As the court of appeals recognized, it would be extremely harsh to leave McGarvey remediless, and the merits of his complaint unheard, as a result of the

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16. In passing, McGarvey would respond to Merck's comment at p. 12, n. 19 of the petition that McGarvey has been "free" to approach the PHRC "at all times," by noting that (1) McGarvey was not, until the *Goger* decision, even arguably required to approach the PHRC, and (2) that McGarvey has *already* approached the PHRC once, and been directed elsewhere. Merck's suggestion that McGarvey should repeatedly approach the PHRC, apparently to see if that agency had altered its position, is not reasonable.

17. The statute as construed by both the district court and the court of appeals requires only that the aggrieved individual "seek redress" from the appropriate state agency. Rejection of any such application by the state agency should fulfill the requirement.

mistaken, if good faith, advice of those government agencies. The court of appeals' decision avoids this result, and permits the merits of McGarvey's complaint to be heard. The result is a fair one, and provides absolutely no grounds for the granting of a writ of certiorari.

III.

The Court Should Grant Certiorari, if at All, Only on the Question of the Proper Construction of § 633(b).

If there is any issue presented by the facts of this case which fulfills Rule 19(1)'s test of "special and important" reasons justifying review by this Court, it is the issue of the proper construction of § 633(b). As noted in Section I of the Argument, *infra*, § 633(b) presents a novel question of statutory construction which has been examined in only two courts of appeals' decisions, both in the Third Circuit.[18] The construction of the statute applied by the court of appeals in these two decisions is contrary to the interpretation sought by the U. S. Department of Labor, the federal agency charged with enforcing the Act. The court of appeals was divided in deciding these cases. Circuit Judge Leonard Garth arguing persuasively in dissent that § 633(b) contemplates the procedure to be followed *if* an aggrieved person chooses to pursue his state remedies, rather than *requiring* the aggrieved person to resort to his state remedies before suit may be filed under the federal act.

Respondent McGarvey submits that the only question that might possibly warrant review by this Court is the question of the interpretation of § 633(b).

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18. *Goger v. H. K. Porter Co., Inc., supra*, and the instant case.

CONCLUSION.

For all the reasons herein, Plaintiff-Respondent Paul J. McGarvey respectfully requests that this Court deny Merck's Petition for a writ of certiorari.

Respectfully submitted,

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